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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 THOMAS WEATHERS, KATHY
15 WEATHERS, TKW LIMITED
16 PARTNERSHIP, T&K WEATHERS
17 LIMITED, COWLITZ COUNTY,
18 MOUNTAIN PEAK MGMT. CORP.,
19 FINANCIAL ASSISTANCE, WAPITI
20 VENTURES LLC, MARLENE M.
BENNETT as Trustee of the MARLENE
M. BENNETT REVOCABLE LIVING
TRUST, PRECISION PROP. MGMT.
CORP., NETFUNDING INC., CORAL
MGMT. INC., and SOUTHWIND
SOFTWARE AND DEVELOPMENT
CORP.

21 Defendants.

CASE NO. C18-5189 RJB

ORDER DENYING
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

22 This matter comes before the Court on Defendants' Motion for Partial Summary
23 Judgment. Dkt. 55. The Court has considered the pleadings filed in support of and in opposition
24 to the motion and the file herein.

1 For the reasons set forth below, the Court should deny Defendants’ Motion for Partial
2 Summary Judgment (Dkt. 55).

3 **I. RELEVANT FACTS AND PROCEDURAL HISTORY**

4 **A. FACTS**

5 On June 28, 2005, Defendants Tom and Kathy Weathers (“Weathers”) were convicted of
6 tax evasion for 1996 and failure to file income tax returns for 1998 through 2002. Dkt. 55, at 4.
7 On October 25, 2005, through the assistance of a Washington attorney, Mr. Bryce Townley,
8 Weathers formed 911 Management, LCC (“911”). Dkt. 55, at 4. The members of 911 were T&K
9 Weathers, LLP¹ (25%), Kathy Weathers (35%), and Club Ed² (40%). Dkt. 55, at 4.

10 In 2007, the Internal Revenue Service (“IRS”) issued three levies totaling \$198,689
11 against 911’s bank account under an alter ego / nominee claim for taxes the Weathers owed for
12 the 1996 tax year. Dkts. 55, at 5; and 58, at 3. The IRS apparently had evidence that Weathers
13 used 911 to conceal income they received from managing hotels in Oregon and rental properties
14 in Washington. Dkt. 59, at 3.

15 In 2008, 911 brought an action against the United States of America (“United States”) in
16 Oregon, challenging the IRS levies on its bank account. Dkt. 58, at 3; *911 Mgmt., LLC v. United*
17

18 ¹ Tom and Kathy Weathers are the general partners of T & K Weathers, LLP,
19 which was formed on March 27, 1996. There are five limited partners: (1) the
20 Thomas D. Weathers and Kathy J. Weathers Family Trust, UA DTD February
21 26, 1996; (2) Brian D. Weathers Irrevocable Trust, UA DTD March 21, 1996;
22 (3) Katie B. Weathers Irrevocable Trust, UA DTD March 21, 1996; (4) Kayla D.
23 Weathers Irrevocable Trust, UA DTD March 21, 1996; and (5) Bradley M.
24 Weathers Irrevocable Trust, UA DTD March 21, 1996. Brian Weathers, Katie
Weathers, Kayla Weathers, and Bradley Weathers are the children of Tom and
Kathy Weathers.

911 Mgmt., LLC v. United States, 657 F. Supp. 2d 1186, 1189 (D. Or. 2009) (citations and quotations omitted).

² “Club Ed purportedly provided educational benefits to its members. Its members consisted of the following: three members of the Weathers family; Thomas Weathers’ cellmate; and the nephew of Daniel Dent, who was 911 Management’s manager.” Dkt. 58, at 4.

1 *States*, 657 F. Supp. 2d 1186, 1187 (D. Or. 2009) (“the Levies Case”).³ The court noted that the
2 IRS may levy on property held by a third party to collect a taxpayer’s debt if, among other
3 circumstances, the third party is the taxpayer’s nominee or alter ego. *911 Mgmt., LLC*, 657 F.
4 Supp. 2d at 1911.

5 The IRS asserted that 911 Management was the nominee or alter ego of Weathers. *911*
6 *Mgmt., LLC*, 657 F. Supp. 2d at 1187. The court, after considering several factors, concluded that
7 “911 Management is the alter ego of the Weatherses.” *Id.* at 1215. The court apparently made no
8 determination that T&K Weathers LLP or any other business entity besides 911 was, or was not,
9 a nominee or alter ego of the Weathers. *See id.*

10 **B. PROCEDURAL HISTORY**

11 In March 2018, the United States brought this action before the Court for two purposes.
12 Dkt. 58, at 5. First, the United States seeks to reduce to judgment federal tax assessments against
13 the following: (1) Thomas and Kathy Weathers for debts owed from tax years 1998 through
14 2011; (2) TKW Limited Partnership for debts owed from 1998 through 2002, 2006, and 2011;
15 and (3) T&K Weathers Limited for 1999 through 2002 and 2006 through 2011. Dkt. 58, at 5–6.

16 Second, the United States seeks to foreclose the related federal tax liens against nine
17 properties in Washington and to obtain an order directing the Weathers to sell property in Belize
18 to partially satisfy the outstanding assessments against the Weathers from 1998 through 2011.
19 Dkt. 58, at 6. The United States alleges that the Weathers own, or have an interest in, each of the
20 properties at issue through entities, including the Defendant entities, that serve as the Weathers’
21

22 ³ Defendants request that the Court take judicial notice of the Findings and Recommendations of Judge Hubel, as
23 adopted by Judge King, reported as *911 Management, LLC v. U.S.*, 957 F. Supp. 2d 1186 (2009); the Order
24 Adopting Judge Hubel’s Findings and Recommendation in the same case; and the Judgment entered in the case on
September 10, 20019. Dkt. 56, at 2. The Court has done so, finding that Defendants have so requested and that the
Court is supplied with the necessary information.

1 nominee or alter ego to the extent the entities have possessed title to or interests in the properties.
2 Dkt. 58, at 6.

3 Defendants move for partial summary judgment of dismissal of the United States’
4 foreclosure claims (Counts 6–15⁴) against certain properties in Washington (Properties 1–9) and
5 Belize. Dkt. 55. Those claims are as follows:

- 6 (a) Count 6, to foreclose federal tax liens on Property 1, currently
7 held by T&K Weathers, LLP,⁵ as to any and all federal tax
8 liens relating to Tom Weathers, Kathy Weathers, or both of
9 them.
- 10 (b) Count 7, to foreclose federal tax liens on Property 2, currently
11 held by T&K Weathers, LLP, as to any and all federal tax liens
12 relating to Tom Weathers, Kathy Weathers, or both of them.
- 13 (c) Count 8, to foreclose federal tax liens on Property 3, currently
14 held by T&K Weathers, LLP, as to any and all federal tax liens
15 relating to Tom Weathers, Kathy Weathers, or both of them.
- 16 (d) Count 9, to foreclose federal tax liens on Property 4, currently
17 held by T&K Weathers, LLP, as to any and all federal tax liens
18 relating to Tom Weathers, Kathy Weathers, or both of them.
- 19 (e) Count 10, to foreclose federal tax liens on Property 5, currently
20 held by T&K Weathers, LLP, as to any and all federal tax liens
21 relating to Tom Weathers, Kathy Weathers, or both of them.
- 22 (f) Count 11, to foreclose federal tax liens on Property 6, currently
23 held by T&K Weathers, LLP, as to any and all federal tax liens
24 relating to Tom Weathers, Kathy Weathers, or both of them.
- (g) Count 12, to foreclose federal tax liens on Property 7, currently
held by Net Funding or T&K Weathers, LLP, as to any and all

20 ⁴ In Counts 1–5, the United States seeks to reduce to judgment unpaid federal taxes owed by various Defendants.
Dkt. 1, at 31–33.

21 ⁵ References to Defendant entities in the record are not a model of clarity. The captions list “T&K WEATHERS
22 LIMITED”; elsewhere, such as in the complaint’s introduction, the United States refers to “T&K Weathers Limited
23 Partnership (‘T&K Weathers’)” (Dkt. 1, at 2); above, in the instant motion for partial summary judgment,
24 Defendants refer to “T&K Weathers, LLP” (Dkt. 55, at 2–3). The Court construes as one and the same: T&K
WEATHERS LIMITED (e.g., from the caption); T&K Weathers Limited Partnership (e.g., from the complaint’s
introduction); T&K Weathers (e.g., as abbreviated in the complaint); and T&K Weathers, LLP (e.g., from the instant
motion for partial summary judgment). The Parties should clarify the identity of Defendant entities as needed.

1 federal tax liens relating to Tom Weathers, Kathy Weathers, or
2 both of them.

3 (h) Count 13, to foreclose federal tax liens on Property 8, currently
4 held by T&K Weathers, LLP, as to any and all federal tax liens
5 relating to Tom Weathers, Kathy Weathers, or both of them.

6 (i) Count 14, to foreclose federal tax liens on Property 9, currently
7 held by Precision Property Management Corporation, as to any
8 and all federal tax liens relating to Tom Weathers, Kathy
9 Weathers, or both of them.

10 (j) Count 15, to foreclose federal tax liens on any Belize Property,
11 as to any and all federal tax liens relating to Tom Weathers,
12 Kathy Weathers, or both of them.

13 Dkt. 55, at 2.

14 In their motion for partial summary judgment, Defendants argue that, pursuant to the
15 doctrine of claim preclusion, the United States is barred from bringing Counts 6–15 in the
16 present case. Dkt. 55.

17 The United States responded in opposition to Defendants’ motion for partial summary
18 judgment. Dkt. 58. The United States argues that (1) “the circumstances of the levy case and this
19 case do not meet the standard for claim preclusion,” and (2) “the United States is not required to
20 assert a tax collection claim as a counterclaim.” Dkt. 58, at 7, 15. The Defendants replied to the
21 United States. Dkt. 65.

22 **II. DISCUSSION**

23 **A. SUMMARY JUDGMENT STANDARD**

24 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
on file, and any affidavits show that there is no genuine issue as to any material fact and that the
movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is
entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient

1 showing on an essential element of a claim in the case on which the nonmoving party has the
2 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of
3 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for
4 the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
5 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some
6 metaphysical doubt.”). *See also* Fed. R. Civ. P. 56(d). Conversely, a genuine dispute over a
7 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
8 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby,*
9 *Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
10 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

11 The determination of the existence of a material fact is often a close question. The court
12 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
13 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
14 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
15 of the nonmoving party only when the facts specifically attested by that party contradict facts
16 specifically attested by the moving party. The nonmoving party may not merely state that it will
17 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
18 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
19 Conclusory, non-specific statements in affidavits are not sufficient, and “missing facts” will not
20 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89 (1990).

21 **B. CLAIM PRECLUSION**

22 The doctrine of claim preclusion, or *res judicata*, bars any future claims that were raised,
23 or could have been raised, in a prior action. *Owens v. Kaiser Foundation Health Plan, Inc.*, 244
24

1 F.3d 708, 713 (9th Cir. 2001). “Claim preclusion is appropriate where: (1) the parties are
2 identical or in privity; (2) the judgment in the prior action was rendered by a court of competent
3 jurisdiction; (3) there was a final judgment on the merits; and (4) the same claim or cause of
4 action was involved in both suits.” *Rein v. Providian Fin. Corp.*, 270 F.3d 895, 899 (9th Cir.
5 2001) (citation omitted).

6 The United States disputes elements one and four. Dkt. 58, at 7.

7 1. The Parties are Identical or in Privity

8 Defendants argue that, because the court in the Levies Case found that 911 was the alter
9 ego or nominee of the Weathers, 911 is in privity with the Defendants in this case. Dkt. 55, at
10 10–11.

11 [The Levies court held that 911 Management, LLC was the alter
12 ego of Thomas and Kathy Weathers and liable for the Weathers’
13 income tax liabilities. This means that the Weathers and 911
14 Management were one and the same or identical with one another.
15 In the present lawsuit, the United States alleges that Defendants are
16 the alter ego of Thomas and Kathy Weathers. In other words, the
17 United States argues that the Weathers and Defendants are one and
18 the same or identical to one another. Certainly, the Weathers and
19 Defendants are at the very least in privity based on Plaintiff’s
20 allegations.

21 However, Defendants do not concede that they are alter egos of the
22 Weathers. They merely assert that, pursuant to Plaintiff’s
23 allegations, Defendants are the same as or in privity with the
24 Weathers for claim preclusion purposes. In other words, Plaintiff’s
allegations establish privity for purposes of claim preclusion and
the Motion.

Dkt. 65, at 2.

Defendants’ argument that the Parties are identical or in privity is without merit.

Although the Levies court found that 911 was the alter ego and nominee of the Weathers and
was considered to be the management of T&K Weathers LLP (“T&K”), a Defendant here, the

1 court did not find that T&K or the other named Defendants were an alter ego or nominee of the
2 Weathers. *See 911 Mgmt., LLC*, 657 F. Supp. 2d 1186.

3 Therefore, the Parties in both suits are not identical or in privity.

4 2. The Same Claim or Cause of Action in Both Suits

5 To determine whether an action involves the same claim or cause of action as a prior
6 action, courts consider four factors: (1) whether rights established by the prior judgment would
7 be impaired by prosecution of the second action; (2) whether both actions present substantially
8 the same evidence; (3) whether both actions involve infringement of the same right; and (4)
9 whether both actions arise out of the same transactional nucleus of facts. *Constantini v. Trans*
10 *World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir. 1982) (quotation and citation omitted). “The
11 last of these criteria is the most important.” *Id.* at 1202.

12 a. *Whether Rights Established by the Prior Judgment Would be Impaired by*
13 *Prosecution of the Second Action*

14 Defendants concede that “Plaintiff is correct that an inconsistent ruling in the present case
15 will not impair rights established in the earlier action.” Dkt. 65, at 3. Indeed, prosecution of this
16 action has no effect on the judgment rendered in the Levies Case.

17 b. *Whether Both Actions Present Substantially the Same Evidence*

18 There are substantial differences between the evidence presented and to be presented in
19 the two cases. The Levies Case determined the propriety of IRS levies on 911’s bank account
20 under an alter ego and nominee theory. *See 911 Mgmt., LLC*, 657 F. Supp. 2d 1186. The instant
21 case involves tax debt and foreclosure claims against property in Washington and Belize.
22 Additionally, the Weathers’ purported control of different entities, named as Defendants here,
23 besides 911 (and T&K to some degree) were not primary issues in the Levies Case. Therefore,
24 the evidence in the two cases differs substantially.

1 c. *Whether Both Actions Involve Infringement of the Same Right*

2 The Unites States argues:

3 [L]evies and foreclosures are distinct tax collection tools
4 governed by different sections of the Tax Code. *See United*
5 *States v. National Bank of Commerce*, 472 U.S. 713, 720–
6 21 (1985); *see also United States v. Zurn*, 432 Fed. Appx.
7 686, 687 (9th Cir. 2011) (noting specific difference
8 between tax levy proceedings and lien foreclosure suits).

9 Dkt. 58, at 13.

10 Defendants argue that “both actions involve the IRS’ seizure or attempted seizure of
11 property it asserts is actually held by (through an alter ego and nominee) and belongs to the
12 Weathers This is an infringement of the same right regardless of the form of the IRS’
13 collection action.” Dkt. 65, at 5.

14 There exists between the two cases a common thread of the Weathers, T&K, the United
15 States, taxes, purported ownership rights, business entities and corresponding theories of alter
16 ego and nominee liability—however, the properties and rights at issue are substantially different.
17 There are substantial differences between 911’s rights in the Levies Case regarding IRS levies on
18 its bank account and, here, any rights the Parties may have, including foreclosure, regarding the
19 properties in Washington and Belize. Therefore, the two cases involve the alleged infringement
20 of different rights.

21 d. *Whether Both Actions Arise Out of the Same Transactional Nucleus of Facts*

22 “When considering whether a prior action involved the same nucleus of facts for
23 preclusion purposes, [the court] must narrowly construe the scope of that earlier action.” *Cent.*
24 *Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002) (quotation omitted).

 Defendants argue:

1 Both cases involve the United States' attempts to collect the
2 Weathers' income tax liability through alter ego and nominee
3 claims against property held by others; property which Plaintiff
4 asserts belongs to the Weathers. Both cases involve the Weathers'
5 transfer of the Washington properties to the Weathers' Family
6 Trust and an irrevocable trust for each of their four children. Both
7 cases involve the formation, ownership, and management of T&K
8 Weathers, LLP.

9 Both cases involve real property and business entities purportedly
10 owned and managed by the Weathers. The real properties and
11 business entities in the present suit included the identical properties
12 and business entities involved in Lawsuit #1. Both cases involve
13 how or whether those properties might be subject to IRS collection
14 actions against the Weathers. In both cases, the United States is
15 asserting alter ego, nominee, and transferee liability claims against
16 various entities which it asserts are indistinguishable from the
17 Weathers.

18 Dkt. 65, at 5–6.

19 Defendants' argument incorrectly generalizes the two cases, obfuscating clear
20 distinctions between them. The transactional nucleus of facts in the Levies Case pertained to
21 911's income and how it was used, with some examination of T&K's management. *See 911*
22 *Mgmt., LLC*, 657 F. Supp. 2d 1186. Here, the transactional nucleus of facts pertains to the
23 Defendants (which do not include 911) and their relationship and actions with respect to property
24 in Washington and Belize.

Applying the narrow approach proffered in *Delta Water Agency*, the Court concludes that
the actions of the two cases do not arise out of the same transactional nucleus of facts.

e. Conclusion

Each of the four factors analyzed above weigh against Defendants. Therefore, the Court
concludes that there does not exist between the two cases the same claim or cause of action.

1 3. Conclusion

2 Defendants' theory of claim preclusion is flawed because (1) the Parties in the two cases
3 are not identical or in privity and (2) the same claims or causes of action are not involved in both
4 suits.

5 **C. COMPULSORY COUNTERCLAIM**

6 A pleading must state as a counterclaim any claim that – at the
7 time of service – the pleader has against an opposing party if the
8 claim: (A) arises out of the transaction or occurrence that is the
9 subject matter of the opposing party's claim; and (B) does not
10 require adding another party over whom the court cannot acquire
11 jurisdiction.

12 Fed. R. Civ. P. 13(a)(1).

13 To the extent that Defendants argue that the United States foreclosure claims were
14 compulsory counterclaims not raised in the Levies Case, that argument is without merit. The
15 United States' claims in the instant case do not arise out of the same transaction or occurrence of
16 911's wrongful levy claim in the Levies Case. Even if they did, it appears that the United States
17 would not have been required to bring the instant foreclosure claims as counterclaims in the
18 Levies Case. *See Gustin v. United States*, 876 F.2d 485, 490 n.1 (5th Cir. 1989) (citing *Pfeiffer*
19 *Co. v. United States*, 518 F.2d 124, 128–29 (8th Cir. 1975)) ("The strictures of Fed. R. Civ. P. 13
20 simply do not apply to counterclaims for delinquent taxes. If the timing and forum are not to the
21 government's liking, the government need not bring the counterclaim.")); *see also United States*
22 *v. RAJMP, Inc.*, 2018 WL 5920145, at *2–3 (S.D. Cal. Nov. 13, 2018) (finding that tax
23 collection claims were not compulsory counterclaims in prior refund suit involving the same tax
24 years).

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The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Robert Bryan

ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - 12